N. KRISHNAMURTHY

v.

LEASING CORP. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. C 31-98-86]
18 MAY 1987

CONTRACT: *Purchase of car - Hire purchase agreement - Consideration - Whether contract good - Sale of Goods Act 1957 - Sections 19, 20 - Whether damages an adequate remedy.*

CIVIL PROCEDURE: *Application by originating summons for declaratory orders - Granting of injunction - Whether a discretionary remedy - When should be resorted to - Ex parte injunction - Whether should be automatically set aside.*

This was an application by originating summons for a declaration that a hire purchase agreement was null and void for failure of consideration. The plaintiff entered into a hire purchase agreement with the defendant for the purchase of a car in which the defendant was to pay the balance of the purchase price to the vendor. The plaintiff was to make monthly instalments but he defaulted and the defendant sought to repossess the car. In response to this the plaintiff filed this originating summons to frustrate the defendant on grounds that the matter had become subjudice.

Held:

[1] The balance of the purchase price i.e. RM116,504.08 plus interest charges was good consideration and together with the mutual promises, made this a good contract.

[2] The granting of injunction is a discretionary remedy and should be the exception rather than the rule and resorted to only in extreme cases. In this instance, damages would have been an adequate remedy and therefore with the dismissal of the claim, the *ex parte* injunction should be automatically set aside.

[3] Inquiry as to damages which the defendant has suffered as a result of this *ex parte* injunction to be conducted by the Senior Assistant Registrar.

[Application dismissed. Costs of application be taxed and paid by plaintiff to defendant, but such costs shall not include any claim for "getting up" the case for defendant.]

Cases referred to:

Dennant v. Skinner & Anor. [1948] 2 All ER 29
Kan Yeow Wing v. Keng Soon Motor Finance Company [1962] MLJ 391
Kiaw Aik Heng Company Limited v. Tan Tien Choy [1964] MLJ 339
United Investment and Finance Ltd. v. Abdul Rahman & Anor. [1966] 2 MLJ 9
United Investment and Finance Limited v. Walker & Anor. [1967] 1 MLJ 30
Third Chandris Shipping Corporation v. Unimarine S.A. [1979] QB 645

Legislation referred to:

Evidence Act 1950, ss. 91, 92
Hire Purchase Act 1967, s. 15
Sale of Goods Act 1957, ss. 15, 20, 24

Other sources referred to:

Benjamin's *Sales of Goods*, 2nd Edn. para. 301, 302, 304
Mallal's Digest, 3rd Edn., Vol. II, p. 795

For the plaintiff - M.S. Murthi; M/s Murthi & Partners
For the defendant - Krishna Aiyer; M/s. Majid (Krishna, Menon & Lee with him)

JUDGMENT

Mahadev Shankar J:

This is an application under an originating summons for a declaration that a hire purchase agreement made on 27 December 1984 was null and void for failure of consideration. Originally the plaintiff also applied for a declaration that the agreement was invalid and void as being *ultra vires* and contrary to the memorandum of association of the defendant. But this prayer was abandoned at the hearing.

The facts are as follows.

On the 10 November 1984 the plaintiff paid RM10,000 to the Forari Corporation Sdn. Bhd. by way of a deposit for a purchase of a Porsche 944 motorcar. The price of the car on the road was RM147,580. It is evident that the plaintiff did not have this kind of money. Both Forari and the plaintiff signed a document evidencing the transaction. In material particular it reads:

> I Krishnamurthy a/l Nagaratnam (hereinafter called "the buyer") hereby confirm having purchased this day from Forari Automobile Sdn. Bhd. (hereinafter called "the seller") the undermentioned goods at the prices and on the terms and conditions hereinafter appearing and subject to the conditions of sale on the back hereof.

Then followed particulars of the make and the model of the car, the price of the car and the accessories and the deposit made. There were spaces in the document for the delivery date and the balance payable and the balance to be financed if by hire purchase. There was a note on the front page that the prices were subject to change without notice and that only the price ruling on the date of delivery would apply. On the back of the document were printed conditions of sale. Condition No. 3 read, "The date given for delivery is approximate only. Delivery must be taken within seven days of the issue of the delivery order or written advice of arrival. Otherwise the buyer will become liable for storage charges. The sellers shall have the right to demand cash before delivery."

Condition 5 provided, "Deposits are not refundable, in the event of cancellation."

On 17 December 1984 the plaintiff paid a further sum of RM19,126.02 to Forari Corporation Sdn. Bhd. who issued an official receipt stating that this money was for payment of, "D/ Payment of lx944."

On 27 December 1984 a formal hire purchase agreement was concluded between the plaintiff and the defendant. This related to a Porsche 944 car whose registration number, engine number and chassis number was specified in the hire purchase agreement which also set out that the cash price of the goods was RM145,630.10 less the deposit paid of RM29,126.02 (i.e. the moneys paid by the plaintiff to Forari) leaving a balance of RM116,504.08 and term charge of RM33,203.66 which added up to RM149,707.74 as the balance payable under the agreement which together with interest and other charges under the hire purchase agreement made the total amount payable RM178,833.76. It appears from the sale document that the plaintiff had also traded in a car to the value RM2,000 towards this transaction. This may thus explain how the cash price was reached.

The hire purchase agreement is a formal agreement which falls squarely within the four walls of ss. 91 and 92 of the Evidence Act 1950. It is abundantly clear from the document that the plaintiff represented himself to the defendant that he was willing to enter into a commercial

transaction with them as a hirer of the car and that the defendant acted on that representation to their detriment making payment to Forari for a sum of RM116,504.08 so that the documents of title to the car could then be handed over.

Counsel for the plaintiff concedes that upon conclusion of the hire purchase agreement and the payment by the defendants of the balance of the purchase price to Forari, the defendants were registered in the records of the RIMV as the owners of the car, and that the plaintiff was only recorded as being the registered owner under a hire purchase agreement. This Agreement provided that the plaintiff should make monthly payments of RM4,158.60 by way of instalments commencing from 27 January 1985.

But the plaintiff did not keep to his word and defaulted. The defendants then sought to repossess the car but they were unable to get any assistance from the plaintiff as to its whereabouts. Clause 8(g) of the Hire Purchase Agreement obliged him to permit the defendants its servants or agents at any reasonable time to inspect the car and give them reasonable and proper facilities to enable them to do so. Clause 8(1) of the Hire Purchase Agreement obliged him to inform the defendants by notice in writing of any change of the address where the car was garaged immediately the change took place.

There are also statutory obligations under the Road Traffic Ordinance upon a registered owner of a vehicle to notify the RIMV in seven days if there is any change in the address at which the vehicle is to be garaged.

In response to the defendants' efforts to repossess the vehicle, the plaintiff did two things. He filed this originating summons on 31 March 1986 in which he initially claimed only a declaration that the hire purchase agreement was void as being *ultra vires* and contrary to the defendant's memorandum of association. Clearly this was inspired by his legal advisors. On his own the plaintiff put the car in the possession of one George Santhanasamy of Messrs. Angel Air & Sea Freight Sdn. Bhd. This man kept the car garaged at his warehouse in Ulu Kelang, Kuala Lumpur. He stripped the number plates of the car and the road tax and covered the care whilst it was at his warehouse. But this did not prevent the defendants' repossessor from getting into the premises on or about 25 June 1986 and repossessing the car.

Notice of intention to repossess had been issued by the defendants on or about 24 February 1986 but at which time three instalments were overdue. Since then the plaintiff had not paid a single instalment under the Agreement and obviously relied upon the filing of this originating summons to frustrate the defendant on the ground that the matter had become subjudice. Indeed on 21 April 1986 the plaintiff's Counsel filed a Certificate of urgency in support of his application on an *ex parte* injunction to restrain the defendant from exercising any of their rights under the hire purchase agreement until his application had been heard. The plaintiff's solicitors also sent a letter to the defendant's manager on the same day threatening to commit him to prison for contempt if the defendant continued to persist in its efforts to repossess the car.

On 22 May 1986 the originating summons was amended to include a prayer for an alternative declaration that the hire purchase agreement was void for failure of consideration.

After the defendant had repossessed the car and given the statutory notice to the plaintiff of his option to pay the balance due, the plaintiff applied for and obtained on 14 July 1986 an *ex parte* injunction preventing the defendant from selling the car in order to satisfy their claims against the plaintiff.

The plaintiff also by his Counsel gave the usual undertaking as to damages. But this undertaking was not backed by any form of security and in that sense was a barren undertaking.

There was another curious aspect to this *ex parte* injunction. When the plaintiff had obtained his order to amend his originating summons on 22 May 1986 there was on file a summons-in-chambers by the plaintiff applying for an injunction which had been fixed on 15 October 1986 for hearing *inter partes*. Without the knowledge of the defendant or his solicitor, the plaintiff's solicitor filed a separate summons-in-chambers on 14 July 1986 and obtained the *ex parte* order.

The defendant's solicitor applied by way of summons-in-chambers filed in August 1986 to have this *ex parte* injunction set aside. It was fixed for hearing on 15 October 1986 but plaintiff's Counsel got an adjournment on the ground that he had a throat infection.

The matter then came on for hearing on 2 April 1987.

Both Counsel for the plaintiff and Counsel for the defendant stated from the Bar table that their research into the law had not revealed any Malaysian decision on the issues which I had to decide.

Counsel for the plaintiff stated that this instructions were, that at the time the sale document was signed on 10 November 1984, there was a specific car in the show room of Forari which was the subject of the document and that this was the very car which was subsequently made the subject matter of the hire purchase agreement. There was no evidence whatsoever of this fact in the numerous affidavits which were filed by the plaintiff in this matter.

The plaintiff's case is grounded on an averment contained in one of his further affidavit (encl. 13) affirmed on 30 April 1986 in which he states:

> Subsequently I arranged for a financing of my purchase from the defendant corporation and the defendant corporation paid a sum of RM116,504.08 to the Forari Corporation Sdn. Bhd., the owner of the vehicle to effectuate the sale to me.
>
> At that point of time the property of the said motor vehicle No. WBA 4168 was vested in me.

In the course of the submissions made by Counsel for both parties, the only issue which it seemed that I had to decide (according to the "pleadings" i.e. the prayer in the originating summons as amended) was whether the hire purchase agreement was null and void because it was not supported by consideration.

But in his submission, Mr. Murthi contended that the effect of the words "having purchased this day" which appeared in the sale document dated 10 November 1984, was that as on that day the plaintiff had become the legal owner of the car which he had offered to buy. In other words, it was being submitted, that in the circumstances of this case, the plaintiff was entitled to say on 10 November 1984 that he was the owner of a Porsche 944 which according to his Counsel from the Bar table, he had seen in Forari's show room.

Let me say straightaway, that I reject this submission out of hand.

It may have been a good way to bring the plaintiff's claim within the ratio of *Dennant v. Skinner & Anor*. [1948] 2 All ER p. 29 where a van was sold at an auction sale of motor vehicles to a purchaser who was permitted to take the van away after he made payment by a cheque which bounced. Before the van could be recovered the purchaser had sold it to a

third party who was held to have acquired good title because in the circumstances of that case it was the intention of the party to pass the property in the van to the purchaser at the time the contract of sale was made, i.e. at the fall of the auctioneer's hammer.

But the facts do not support this submission. Firstly, if the plaintiff was in fact buying a specific car which he had seen in the Showroom and not merely a car of that type, I am of the view that the plaintiff and his legal adviser would not have failed to have mentioned it in one of the numerous affidavits filed in support of this claim. Secondly, the sale document does not support such a contention either. If it was a specific car the plaintiff was buying, there was no reason to leave blank in the sale document the spaces left for "colour, upholstery, engine number and chassis number." These blanks satisfied me on the balance of probabilities that it was only a Porsche 944 model of car which the plaintiff had offered to buy and the defendant had offered to sell. Furthermore, the delivery date, balance payable, and balance to be financed by hire purchase had all been left blank. This leads the inference that within a reasonable time, if the plaintiff came up with a balance of the purchase price payable, the defendant would make available to him a car of that make and model. Under the conditions of sale, it is stated that the delivery date is approximate only. But there was no delivery date stated in the document and therefore delivery was only to be within a reasonable time. If the plaintiff could not come up with the balance of money, the deposit was not refundable.

In these circumstance I am of the view that *Dennant v. Skinner & Anor*. is of no help to the plaintiff at all.

Sections 19 and 20 of our Sale of Goods Act 1957 was also referred to. The material provisions of these two sections is that where there is a contract for the sale of specific goods the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred. That intention has to be gathered from the terms of the contract, the conduct of the parties, and the circumstances of the case. Unless a different intention so appears, the rules contained in ss. 20 to 24 are rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer. Now s. 20 provides that where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of the goods or both is postponed.

So what Mr. Murthi of Counsel for the plaintiff was submitting was that this was an unconditional contract for the sale of a specific car in a deliverable state, and that under s. 20 therefore property in the car passed to the plaintiff when the contract was made, and that the terms of the contract, the conduct of the parties, and the circumstances of the case, did not show any different intention, and consequently it was immaterial whether the time of payment or the time of delivery had been postponed.

In these circumstances he submitted that the only right which Forari had, after it accepted RM10,000 from the plaintiff on 10 November 1984, was the right of an unpaid vendor and all that such an unpaid vendor could do was to withhold delivery and to retain possession of the goods by way of a lien. So it was further submitted that at the time of the execution of the hire purchase agreement and thereafter, the plaintiff continued to be the owner of the car and the only right acquired by the defendant from Forari in exchange for the payment of RM116,504.08 was a right to claim from the plaintiff by way of an assignment of this debt, a similar sum as monies due and owing.

It is with deep regret that I am constrained to observe that there are none so blind as those who will not see.

Paragraphs 302, and 303 of Benjamin's *Sale of Goods*, 2nd Edn., was read out to the Court. But it is para. 301 which was relevant. The intention of Forari Corporation Sendirian Berhad on 10 November 1984 was patently obvious from a reading of the sale document and the circumstances of the case. They were saying that they would forfeit the RM10,000 paid unless within a reasonable time the plaintiff came up with RM137,580 either by himself or with the help of a finance company. And once that balance was produced they would undertake to deliver a car of the make and model the plaintiff had offered to buy. So this was not a contract for the sale of specific goods. It was a contract for the sale of a specific type of goods. And property in them was only to be transferred when the balance was paid.

The next point to consider is the identity of the buyer. As the facts show, Forari who sold the car, did not transfer it to the plaintiff. They transferred it to the defendant who as their buyer was able to claim ownership of the vehicle from the moment it was registered. That is when title passed, and the "buyer" in the transaction from Forari was not the "buyer" in the transaction from Forari was not the plaintiff but the defendant who advanced almost 80% of the value of the car to Forari in cash. Admittedly the plaintiff had paid the remaining 20% by way of advance deposits and down payments but the figures before me clearly show that he was given credit for this payment in the defendant's books. What he then had to pay the defendant, under the hire purchase agreement was the difference in the cash price plus interest charges. Consequently I do not regard this case as a contract where there is any intention whatsoever on the part of Forari to transfer property in the car on 10 November 1984 on acceptance of a mere RM10,000.

Furthermore as for s. 20 of the Sale of Goods Act, I do not regard this as an unconditional contract for the sale of specific goods in a deliverable state. It was a contract which was conditional upon the full purchase price being paid subject to credit being given for the initial deposit and the contract was for a sale not of specific goods but of goods of a specified type.

Without the benefit of a considered submission, I am inclined to hold that the words "goods in a deliverable state" must mean goods which are capable of immediate delivery at the time the contract is made. In this case the obligation to deliver only arose if and when the full purchase price was paid and upon that even the duty to deliver was dependent upon the vendor's capacity to do so, i.e. "when able".

From any point of view, therefore, the submission made for the plaintiff fell below the bounds of credibility.

It will be remembered that both Counsel stated that there were no local decisions on these matters and one of them even claimed to have combed through Mallal's Digest. In substance the plaintiff's submission was that the defendant was lending money on the security of a car which at all material times was the property of the plaintiff. Digested in *Mallal's Digest* 3rd Edn. Vol. II at p. 795, is *Kan Yeow Wing v. Keng Soon Motor Finance Company* [1962] MLJ 391 which is a Malaysian decision on the point. On the same page is a reference to *Kiaw Aik Heng Company Limited v. Tan Tien Choy* [1964] MLJ 339 which is a Singapore decision on the point. There are two other decisions on that page which are not irrelevant to the present problem. Since then we have had *United Investment and Finance Ltd. v. Abdul Rahman & Anor.* [1966] 2 MLJ p. 9, and *United Investment and Finance Limited v. Walker & Anor.* [1967] 1 MLJ p. 30.

Nor is that all. The sole ground on which the plaintiff puts forward this case was that there was no consideration to support the hire purchase agreement. The short answer to that is that there was RM116,504.08 worth of consideration plus interest charges and mutual promises in support of it which made it a good contract.

Estoppel, and the rule precluding approbation and reprobation could also been urged.

As I received so little meaningful assistance from Counsel I received the question of costs even though I summarily dismissed the claim.

My attention was then drawn to the application to set aside the *ex parte* injunction which application was still pending on the Court file. Defence Counsel also applied to have damages assessed on the ground that the *ex parte* injunction had been improperly obtained and the defendant, in deference to the Court order, had been forced to keep the car in their yard.

Having had the benefit of going through the entire file, and in the light of other cases which have come up before me in the past few months, I think it desirable to reiterate with the strongest emphasis that the granting of injunctions is a discretionary remedy. In these days of rapid communication, the granting of an *ex parte* injunction should be the exception rather than the rule and resorted to only in extreme cases. Here was an instance where damages would have been an adequate remedy. I also feel compelled to draw the attention of all concerned, that a bare undertaking as to damages is meaningless.

In the *Third Chandris Shipping Corporation v. Unimarine S.A.*. [1979] QB 645 Denning LJ referred to a security or a bond being required to support the undertaking as to damages where the person giving the undertaking was obviously someone who did not have necessary backup. Certificates of urgency, have also become too common. It is hard to see what their relevance is in simple money claims where there is no justification for queue-jumping.

However I agree with defence Counsel that this is a case where the dismissal of the claim must result in the *ex parte* injunction being automatically vacated and in all the circumstances of the case there should also be an inquiry as to the damages which the defendants have suffered as a result of this *ex parte* injunction being made. I therefore direct that such inquiry be conducted by the Senior Assistant Registrar on a date to be fixed by him so that the necessary evidence can be adduced.

On 30 June 1986 the defendants sent the statutory notice to the plaintiff under s. 15 of the Hire Purchase Act in which they gave him an option to pay RM42,214.93 if he wished to have the vehicle back. But the plaintiff has paid nothing. The defendants have the car. What they will receive for it on a sale today is a matter for evidence. I think the justice of the case requires me to make an order that the plaintiff do pay into Court within fourteen days from today the sum of RM20,000 as security in support of the undertaking as to damages which was given earlier. This will be held pending completion of the inquiry and disposed off as the Senior Assistant Registrar shall direct.

In view of the minimum assistance which I have received from Counsel in this case, I order the costs of this application be taxed and paid by the plaintiff to the defendants, but such costs shall not include any claim for "getting up" the case for the defendants.

Also found at [1987] 2 CLJ 60